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No. 90-1360

In the Supreme Court of the United States

OCTOBER TERM, 1990

SEA-LAND SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, waives the sovereign immunity of the United States with respect to maritime tort claims arising out of the performance of discretionary government functions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 919 F.2d 888. The opinion of the district court (Pet. App. 13a-22a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1990. The petition for a writ of certiorari was filed on February 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During World War II, the War Shipping Administration (WSA) was created to assume control of the Nation's merchant marine, to provide for its

rapid expansion, and to ensure its effective use in the prosecution of the war. See Exec. Order No. 9054, 3 C.F.R. 1086 (1938-1943 comp.). Most merchant vessels under the control of the WSA, both pre-existing vessels and those built to U.S. Maritime Commission specifications during the war, were operated by private shipping companies pursuant to general agency agreements with WSA. See *Report of the War Shipping Administrator to the President: The United States Merchant Marine at War* 33, 39-40 (1946). To resolve uncertainty as to the liability of the United States for injuries occurring on those vessels, Congress enacted the War Shipping Administration Clarification Act of 1943, ch. 26, § 1(a), 57 Stat. 45 (codified at 50 U.S.C. App. 1291(a)).[1] The Clarification Act provides that actions arising from injuries to seamen aboard merchant vessels under the control of the WSA may be brought under the Suits in Admiralty Act (SIAA), 46 U.S.C. App. 741 *et seq.*

The SIAA, enacted in 1920, waives the sovereign immunity of the United States with respect to certain maritime claims, including claims involving government-owned merchant vessels. The statute provides that "[i]n cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States." 46 U.S.C. App. 742. The SIAA does not provide a cause of action against the United States, but acts only as a waiver of sovereign immunity, serving as a "jurisdictional hook upon which to hang a traditional admiralty claim." *Williams* v.

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[1] See S. Rep. No. 62, 78th Cong., 1st Sess. 5-6 (1943); H.R. Rep. No. 2572, 77th Cong., 2d Sess. 9 (1942).

Central Gulf Lines, 874 F.2d 1058, 1059 (5th Cir. 1989), cert. denied, 110 S. Ct. 843 (1990). See 2 M. Norris, *The Law of Seamen* §§ 28:1, 28:2, at 258-259, 260-261 (4th ed. 1985).

2. In this action under the SIAA, petitioner seeks indemnity or contribution from the United States for payments it made to settle a wrongful death action. Between 1949 and 1978, the decedent, David Swogger, served upon vessels owned by petitioner and four other private parties. The complaint in the wrongful death action alleged that Swogger contracted mesothelioma, a form of cancer, as a result of his exposure to asbestos aboard those vessels. In 1985, petitioner settled with Swogger's estate. Two years later, petitioner commenced this action, alleging that Swogger's disease was attributable, in whole or part, to his exposure to asbestos while he served, from 1943 to 1948, aboard WSA vessels. Pet. App. 2a-3a, 15a.

3. The district court granted the government's motion to dismiss the action. Pet. App. 13a-22a. The court noted that, with one exception, all of the courts of appeals to have addressed the issue had held that the SIAA does not waive sovereign immunity with respect to claims arising from the performance of discretionary governmental functions. *Id.* at 18a-19a. Even the Fourth Circuit case that appeared to reach a contrary conclusion, the district court continued, "ha[d] been eroded by subsequent decisions of that circuit." *Id.* at 19a. The court found the prevailing interpretation persuasive in view of "the separation of powers doctrine" and "the general rule that waivers of sovereign immunity [are] strictly construed." *Id.* at 19a-20a. The court also held that petitioner's suit sought to impose liability on the United States

for a decision "based on policy and discretion"—the wartime decision "to construct and operate a merchant marine fleet on an expedited and uniform basis." *Id.* at 22a.

4. In the court of appeals, petitioner renewed its contentions that the SIAA is a waiver of sovereign immunity even with respect to actions challenging the exercise of governmental discretion and that the claims in this case were beyond the scope of any discretionary function exception to the SIAA. The court of appeals rejected both contentions and affirmed the dismissal of the action. Pet. App. 1a-12a.

a. With respect to the scope of the SIAA, the court of appeals began with the principles, recognized by this Court, that "a waiver of sovereign immunity cannot be lightly implied, but must be unequivocally expressed" (Pet. App. 4a) and that "statutes placing the United States in the same position as a private party * * * have been read narrowly to preserve certain immunities that the United States has enjoyed historically" (*ibid.*). "[W]hen the issue is whether Congress has waived sovereign immunity for the consequences of governmental policymaking," the court of appeals continued, "courts have recognized the sensitive nature of the issue and have declined to find a waiver absent unmistakable evidence of such an intent." *Id.* at 5a.

The court acknowledged that the SIAA, unlike the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2680(a), does not contain an express discretionary function exception. Pet. App. 6a. Nevertheless, relying on *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984), the court concluded that the FTCA exception "merely makes explicit what would otherwise

be implicit" and that "a general waiver of sovereign immunity" should not be read "to include a waiver of immunity with respect to damage occasioned by policy decisions." Pet. App. 6a-7a. The court held that the SIAA, "which explicitly contains only a general waiver, also implicitly contains a discretionary function exception to its waiver of sovereign immunity." *Id.* at 7a.

b. The court also held, in accordance with decisions of the Second and Fifth Circuits, that the discretionary function exception implicit in the SIAA bars petitioner's claims in this case. Pet. App. 8a-11a; see *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d 31, 34-36 (2d Cir. 1989); *Gordon* v. *Lykes Bros. S.S. Co.*, 835 F.2d 96, 98-99 (5th Cir.), cert. denied, 488 U.S. 825 (1988). In view of the government's effort "to assure the most effective utilization of the shipping of the United States for the successful prosecution of the war," the court concluded, "the use of asbestos in ships, whether traceable to a conscious decision or not, was a policy judgment." Pet. App. 10a. That determination, the court continued, applied to the use of ships after the war and to all of petitioner's theories of liability, including those based on an alleged duty to warn of the dangers of asbestos and on a warranty of seaworthiness. *Id.* at 10a-11a.

ARGUMENT

This is at least the fifth case in which the Court has been asked to review the question whether the United States is subject to suit under the SIAA for the exercise of governmental discretion.[2] As in the earlier cases, petitioner argues (1) that the language of the Act and the absence in the SIAA of an express discretionary function exception compel the conclusion that the government is liable on such claims, and (2) that there is a conflict on this issue between *Lane* v. *United States*, 529 F.2d 175 (4th Cir. 1975), and decisions of other courts of appeals. Those contentions are without merit, and further review is not warranted.

1. With its decision in this case, the Third Circuit joined seven other circuits that have held that the SIAA does not waive the government's sovereign immunity with respect to claims arising from the performance of discretionary functions. *Canadian Transport Co.* v. *United States*, 663 F.2d 1081, 1085-1087 (D.C. Cir. 1980); *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977); *Brown* v. *United States*, 790 F.2d 199, 200 n.1 (1st Cir. 1986), cert. denied, 479 U.S. 1058

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[2] *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977) (No. 76-807); *Bearce* v. *United States*, 614 F.2d 556, 559-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980) (No. 79-1961); *Brown* v. *United States*, 790 F.2d 199 (1st Cir. 1986), cert. denied, 479 U.S. 1058 (1987) (Nos. 86-202 and 86-528); *In re Ohio River Disaster Litigation*, 862 F.2d 1237 (6th Cir. 1988), cert. denied, 493 U.S. 813 (1989) (No. 88-1904). See also *Gordon* v. *Lykes Bros. S.S. Co.*, 835 F.2d 96, 98-99 (5th Cir.), cert. denied, 488 U.S. 825 (1988) (No. 87-2035); *Chute* v. *United States*, 610 F.2d 7, 12-13 (1st Cir. 1979), cert. denied, 446 U.S. 936 (1980) (No. 79-1311).

(1987); *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d at 34-36; *Wiggins* v. *United States*, 799 F.2d 962, 964-966 (5th Cir. 1986); *Gordon* v. *Lykes Bros. S.S. Co.*, 835 F.2d at 98-99; *Gemp* v. *United States*, 684 F.2d 404, 408 (6th Cir. 1982); *Chotin Transp., Inc.* v. *United States*, 819 F.2d 1342, 1347 (6th Cir.) (en banc), cert. denied, 484 U.S. 953 (1987); *In re Ohio River Disaster Litigation*, 862 F.2d 1237, 1244 (6th Cir. 1988), cert. denied, 493 U.S. 813 (1989); *Estate of Callas* v. *United States*, 682 F.2d 613, 619 (7th Cir. 1982); *Bearce* v. *United States*, 614 F.2d 556, 559-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Williams* v. *United States*, 747 F.2d 700 (11th Cir. 1984), aff'g 581 F. Supp. 847 (S.D. Ga. 1983).

The consensus among the courts of appeals on this issue is well founded. As recognized by the Congress that enacted the Federal Tort Claims Act and by this Court, the FTCA's express discretionary function exception codifies a limitation on judicial review that courts were expected to implement in any event. *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984); *Dalehite* v. *United States*, 346 U.S. 15, 27 (1953).[3] As the Court explained in *Varig Airlines*, 467 U.S. at 810:

> It was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction; nevertheless, the specific exception was added to make clear

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[3] See *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 29 (1942) (statement by Assistant Attorney General Francis M. Shea).

> that the Act was not to be extended into the realm of the validity of legislation or discretionary administrative action.

Thus, there is nothing anomalous in the recognition of the same limitation in the SIAA, even in the absence of an express exception.

The prevailing interpretation of the SIAA is grounded in the courts' longstanding reluctance to "enquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Imposition of liability on the theory that policymakers have wrongfully exercised their lawful discretion would permit " 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," *Varig Airlines*, 467 U.S. at 814.[4] The courts

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[4] Accord, *e.g.*, Pet. App. 5a ("the imposition of liability for damages occasioned by governmental policymaking would necessarily involve a very substantial, if not prohibitive, social cost not only in terms of the imposed liability itself, but also in terms of the constraining effect of that liability on the decisions of governmental policymakers"); *Gercey* v. *United States*, 540 F.2d at 539 ("Were there no * * * immunity for policy making decisions, all administrative and legislative decisions concerning the public interest in maritime matters would be subject to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries. That, in our view, would be an intolerable state of affairs."); *Canadian Transport Co.* v. *United States*, 663 F.2d at 1085; *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d at 35.

The intrusive judicial review that would flow from petitioner's interpretation of the SIAA is not, as petitioner suggests (Pet. 17-18), analogous to review under the Administrative Procedure Act. Under the APA, the courts' role is limited to determining whether agency action is violative of

have quite properly refused to read the broad language of the SIAA to embody such a radical extension of judicial inquiry into the exercise of governmental discretion. As the court of appeals explained, "Congress must speak with unmistakable intent in order to waive tort immunity for the government's discretionary functions." Pet. App. 8a.

As a general matter, "a waiver of sovereign immunity cannot be lightly implied, but must be unequivocally expressed." *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986). Accord *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986) (waivers of sovereign immunity are construed "strictly in favor of the sovereign"); *McMahon* v. *United States*, 342 U.S. 25, 27 (1951) (recognizing the applicability of that canon to legislation enacted for the benefit of seamen). Moreover, as the courts have recognized, the need to avoid judicial intrusion into executive policymaking implicates important principles of separation of powers. *E.g.*, *Canadian Transport Co.* v. *United States*, 663 F.2d at 1086; *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d at 35. See also *Caban* v. *United States*, 671 F.2d 1230, 1233 (2d Cir. 1982) (discretionary function exception "protects the principles embodied in the separation of powers doctrine by keeping the judiciary from deciding questions consigned to the executive and legislative branches of the

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the Constitution or a statute or is arbitrary and capricious, and relief is designed to enforce compliance with those standards. By contrast, under the regime petitioners advocate, the exercise of policymaking discretion would be measured against standards of negligence or, under the theory advanced in this case, strict liability, and the United States would be required to pay damages.

government"). The prevailing interpretation of the SIAA gives due weight to those considerations.[5]

The consensus among the courts of appeals finds further support in a 1960 amendment to the SIAA. Prior to that time, the statute was limited to admiralty claims involving merchant vessels. The 1960 amendment extended the SIAA to any action against the United States that would have been maintainable in admiralty "if a private person or property were involved." Act of Sept. 13, 1960, Pub. L. No. 86-770, § 3, 74 Stat. 912 (codified at 46 U.S.C. App. 742). As amended, the SIAA reaches certain maritime tort claims that would otherwise be brought under the FTCA.[6] Indeed, because there is an exception to the FTCA for claims maintainable under the SIAA, 28 U.S.C. 2680(d), the effect of the SIAA amendment was to make that statute the exclusive vehicle for such actions.

If petitioner's reading of the SIAA is correct, the 1960 amendment eliminated the discretionary function exception with respect to those types of claims.[7]

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[5] Contrary to petitioner's assertion (Pet. 14-15), the court of appeals did not reach the question whether the separation of powers doctrine compels recognition of a discretionary function exception for claims brought under the SIAA. Rather, the court made clear that the intrusive judicial review entailed by petitioner's position was one of several bases for insisting on a clear and unambiguous congressional intention to waive sovereign immunity for damages actions arising from government policymaking. Pet. App. 5a, 8a.

[6] See *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 172 (1976).

[7] For instance, in *In re Ohio River Disaster Litigation*, *supra*, the United States was sued under the SIAA for claims arising from its operation of a system of dams on the Ohio River. Under petitioner's view, those claims should not have been subject to any discretionary function exception.

The language and legislative history of the amendment provide no support whatever for that view. The sole purpose of the 1960 amendment was to eliminate confusion concerning the proper forum for certain maritime actions; it did not alter the scope of preexisting waivers of sovereign immunity or the principles governing liability in tort suits against the government. See generally *United States* v. *United Continental Tuna Corp.*, 425 U.S. at 170-178. Congress must have understood—consistent with the belief underlying the enactment of the discretionary function exception to the FTCA, see pp. 7-8, *supra*—that the SIAA did not authorize actions based upon discretionary functions and that the transfer of some suits from the civil to the admiralty side of the district courts' dockets would not expand the tort liability of the United States. See *Bearce* v. *United States*, 614 F.2d at 558-560.

2. Petitioner's elaborate review of the history of the SIAA and the seaman's cause of action for the unseaworthiness of a vessel (Pet. 5-13) casts no doubt on the prevailing interpretation of that statute. Nothing in the legislative history of the SIAA or decisions of this Court applying that statute touches on the question whether the United States should be held liable in damages based upon the exercise of governmental discretion. The considerations underlying the prevailing interpretation of the SIAA have as much force with respect to claims based upon the alleged unseaworthiness of vessels as to any other theory of liability. As the Fifth Circuit observed in *Gordon*, the immunity of the United States for the performance of discretionary functions "cannot be overcome by clothing the discretionary act in the maritime uniform of a breach of duty to provide a seaworthy vessel.

Nomenclature, even when backed by the traditions of admiralty law, must yield to the force of those deep roots that impart strength to the discretionary function exception." 835 F.2d at 100. Accord *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d at 37.

As the facts of this case dramatically demonstrate, the imposition of liability on the United States based upon the exercise of governmental discretion does not follow from the SIAA's purpose to eliminate competitive inequality between government-owned and private merchant vessels. As the Third Circuit and two other courts of appeals have recognized, claims of the type asserted in this case arise out of a massive government program to marshal and expand the Nation's merchant shipping in order to win a global war. To that end, the government assumed control over the existing merchant fleet and commissioned a huge number of new vessels employing existing designs and materials, including asbestos.[8] Under petitioner's theory, the government would be held strictly liable, regardless of fault, for asbestos-related injuries attributable to those efforts.

The statements assembled by petitioner from the legislative history of the SIAA and this Court's decisions suggest no intention to achieve any such result. The principle that the government and private shipowners should receive equal treatment does not support attaching liability to the exercise of governmental policymaking authority. "[I]t is not a tort for government to govern." *Dalehite* v. *United States*, 346 U.S. at 57 (Jackson, J., dissenting).

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[8] Pet. App. 8a-12a; *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d at 35; *Gordon* v. *Lykes Bros. S.S. Co.*, 835 F.2d at 99-100.

3. The asserted conflict between *Lane* v. *United States*, 529 F.2d 175 (4th Cir. 1975), and all other pertinent decisions does not call for this Court's review. *Lane* was the first decision to address the question whether the SIAA waives sovereign immunity for the performance of discretionary functions, and the court's cursory analysis did not even allude to the grounds that are now uniformly understood to foreclose such a waiver. Moreover, in *Faust* v. *South Carolina State Highway Dep't*, 721 F.2d 934, 939 (1983), cert. denied, 467 U.S. 1226 (1984), the Fourth Circuit determined that the government could not be held liable in an action under the SIAA for an allegedly negligent breach of a statutory duty to regulate obstructions in navigable waterways. Although the decision was not framed in terms of the discretionary function exception as such, the court cited with approval decisions suggesting that the SIAA does not waive sovereign immunity with respect to "an unreviewable discretionary function." *Ibid.* As the Fifth Circuit observed in declining to follow *Lane*, "[i]t can fairly be said that the Fourth Circuit is no longer on record as having held unassailably that no discretionary function exception is implied in the [SIAA]. It has weakened or cast doubt upon the holding in *Lane*." *Wiggins* v. *United States*, 799 F.2d at 965. Accord *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d at 35.*

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* The reasoning of *Magno* v. *Corros*, 630 F.2d 224, 229 (1980), cert. denied, 451 U.S. 970 (1984), in which the Fourth Circuit rejected a claim that the United States could be held liable for negligence in marking a dike with navigational aids, also casts doubt on *Lane*. There, citing *Gercey* v. *United States*, *supra*, the court observed that imposition of liability based upon alleged negligence in marking obstruc-

Significantly, we are aware of no case since *Lane* in which the Fourth Circuit has allowed an action to proceed under the SIAA when that action was based upon the exercise of policymaking discretion. It thus appears that, even in the Fourth Circuit, *Lane* has no continuing significance. Until such time as the Fourth Circuit breathes new life into that aberrant decision, there is no warrant for the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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tions would "in effect direct the Coast Guard how to spend its limited resources." 630 F.2d at 229.

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